whether the agency's action was arbitrary or capricious. Rather, the only function of the phrase was to take into account the fact that a literal reading of the section, without this qualification, would have led to the incongruous result that, where the Commission had acted arbitrarily in refusing to consider an application or in excluding evidence, upon reversal and remand the Commission would still be bound to act "upon the basis of the proceedings already had and the record upon which said appeal was heard and determined."

Respondents, on the other hand, assert that under the "unless otherwise ordered" provision the Court of Appeals was vested with broad power to "determine the scope of the remanded proceeding" (West Jersey Br. p. 10) and that it can do so without soliciting or considering the Commission's views. This, of course, would be a marked departure from the traditional rule which requires the court to give effect to the Commission's determination with respect to the desirability of entertaining new applications or hearing new evidence unless its ruling is found to be arbitrary or unreasonable.

The only standards which Respondents suggest should be applied by the court in making this determination are whether the court regards its decision as being in the "public interest" (West Jersey Br. p. 9) and whether the decision is a "product of the exercise of judicial discretion" (Giordano Br. p. 7). Whether these particular standards are employed or some other equivalent formulation — e.g., whether the court believes its decision rather than the Commission's will best serve the public convenience and necessity — it is clear that, once the type of review regulated by the "arbitrary and capricious" rule is abandoned, the only other rule can be whether the court thinks its decision preferable to that of the Commission.[1]

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[1] In the Court below West Jersey urged that its request was "... directed to the exercise of the Court's original jurisdic-

(*Continued, next page*)

The import of such a reading of Section 402(h) in terms of the type of authority conferred upon the Court is well illustrated in this case. For, in this case the Court summarily rejected the Commission's considered judgment on the disposition of a proceeding which had been pending before it for more than six years. The Court did so without the benefit of oral argument; it did not render any opinion, but rather issued a peremptory order only, which was devoid of any determination that the Commission erred in any respect. Proceeding in this fashion, the Court directed the Commission (1) to reopen the record, (2) to accept the late application of West Jersey and of any other qualified applicants, (3) to allow intervention by receiver Giordano, (4) to hold new comparative proceedings to determine the best qualified applicant, and (5) to grant the application for assignment to Giordano.[2]

(Footnote 1, continued)
tion and is not in the nature of an appeal from a final order wherein this Court is obligated to defer to the Commission's expertise and discretion. The normal standard of review applied by this Court to Commission action is not here involved. The relief sought pursuant to Section 402(h) is directed to this Court's original and not its reviewing authority." (Opposition to Motion for Remand pp. 5-6, filed December 23, 1964.)

[2] West Jersey questions whether the Order of the Court directed grant of the application for assignment to Giordano (West Jersey Brief p. 6, f.n. 4). The short answer is (1) the Court's Order which explicitly granted Giordano's request for affirmative relief; and (2) the Commission itself so construed the Court Order. In its Petition for Rehearing filed April 1, 1965, the Commission stated (p. 3):

> "In granting the affirmative relief requested by the intervenor it appears that the Court's order has directed the Commission to grant the pending application of John C. Giordano for consent to the assignment to him of the construction permit of Station WJJZ. (See 'Opposition to Motion for Remand and Request for Affirmative Relief' filed December 23, 1964 by John C. Giordano, Receiver of the assets of Mount Holly-Burlington Broadcasting Co., Inc., p. 11; and the Order of March 17, 1965 granting 'intervenor's request for affirmative relief.') This action, if intended, is we believe unprecedented and runs clearly counter to the repeated assertions of this Court that the grant or denial of an application involves determinations which the Commission alone may make."

It is self evident that such determinations are administrative and not judicial. Thus, it was not urged on the Court below that the Commission erred, or that it had been arbitrary in its proposed disposition of this case: Rather it was contended that the Court of Appeals was invested with original jurisdiction to exercise its discretion in preference to that of the Commission. As Respondent West Jersey points out (p. 4, f.n.2), the considerations urged by it in support of its request that the court order the Commission to entertain its application were "the comparative weakness of the Halpern and Seltzer application, the equities of innocent station employees and creditors and the public interest in continuing a meritorious service from a station located in Mount Holly." Certainly the determination of such questions has traditionally been made by the agency, and not by the court.

The only case of which we know in which a similar — indeed, we think indistinguishable — delegation of power was involved is *Radio Commission v. General Electric Co.*, 281 U.S. 464. There, the Court of Appeals for the District of Columbia was given power, in reviewing a decision of the Radio Commission, to take additional evidence if it thought it proper and to "alter or revise the decision appealed from and enter such judgment as to it may seem just." *Id.* at 467. This Court held that in exercising this power the Court of Appeals was not acting as an Article III court but rather simply as an administrative agency. Further, this Court recognized that the separation of powers inherent in our Constitution prevented the delegation and exercise of similar powers by courts provided for under Article III of the Constitution. "But," said the Supreme Court, "this court cannot be invested with jurisdiction of that character, whether for purposes of review or otherwise. It was brought into being by the judiciary article of the Constitution, is invested with judicial power only . . . nor can it exercise or participate in the exercise of functions which are essentially legislative or administrative." *Id.* at 469.

Having amended the statute in order to eliminate this problem, see *Federal Radio Commission v. Nelson Bros. Co.*, 289 U.S. 266, 275, it would indeed be extraordinary if the Congress had reintroduced it in 1952 in enacting 402(h). At any rate, the issue whether the Respondents' reading of Section 402(h) is correct — involving as it does the questions whether the Congress intended to treat the Federal Communications Commission in this unique fashion, whether this Court has appellate jurisdiction and whether such authority may constitutionally be conferred upon the Court of Appeals, see *Glidden Co. v. Zdanok*, 370 U.S. 530, 580 — deserves prompt resolution by this Court.

Respondents contend that grant of the Petition for *Certiorari* is not warranted for the asserted reason that the circumstances involved herein are unique. Thus, Giordano asserts that "... there is no reason to anticipate that there will be a similar set of facts involved in any subsequent cases." (Br. p. 10); and West Jersey contends that the "factual and jurisdictional setting in which the Order below was issued is so specialized as to be virtually unique." (Br. p. 11.) The criteria which Respondents have urged as to when the statute is applicable does not, however, support that conclusion. Thus, Giordano asserts that under Section 402(h) "When the Court believes in the exercise of its judicial discretion that the facts of a particular case justify the addition of new parties and new issues and the compiling of a new record, it may order the Commission to act appropriately" (Br. p. 6). Clearly, tested by this recommended standard, there is literally no situation in which the Court of Appeals could not exercise the power Respondents assert has been granted under Section 402(h).[3]

[3] During the past year 53 appeals from F.C.C. decisions were filed in the Court of Appeals for the District of Columbia.

West Jersey purports to advance a more limited standard in an attempt to confine the scope of the exercise of such power. West Jersey asserts that the power of the Court under 402(h) comes into play only where the Court finds some independent error by the agency, unrelated to the scope of the agency proceeding. That is, the court could not decide on other than the traditional grounds whether the Commission has erred in failing to entertain an application or consider certain evidence. However, once it decides that the Commission has committed some error of law, then the Court is free to exercise its power under section 402(h) to order the Commission on remand to admit new parties or to accept new evidence. Thus, in the case at bar the error which, according to West Jersey, authorized the court to "determine the scope of the remanded proceeding" related solely to the lawfulness of the grant to the originally successful applicant. At no point in the litigation did anyone assert that the Commission had acted arbitrarily in not opening the proceeding to new applications after the originally successful applicant informed that Commission that it was withdrawing. Yet, the Court, having reversed the Commission on other grounds, directed the Commission to consider West Jersey's application on remand.

To be sure, this interpretation of 402(h), which requires a finding of independent error before the Court may exercise its power to direct the scope of remand is not as broad an interpretation as that urged by respondent Giordano. But it can hardly be asserted that under the West Jersey interpretation it would be a "unique" case in which the Court's 402(h) power could be employed, for it could be employed in every case in which the Court finds an error of law by the Commission. Thus the importance of the issue in terms of the definition of the Court's power is in no way mitigated

by the circumstances under which that power may be exercised.[4]

The question of statutory construction presented by this case thus has two aspects. First does Section 402 (h) confer upon the Court of Appeals a function significantly different in character from that exercised by courts of appeals when reviewing the decisions of other administrative agencies? Second, it it does, what are the circumstances under which this power may be exercised? A prompt and authoritative determination of these questions is of evident importance to the administration of the Communications Act. We respectfully submit that the petition for *certiorari* should be granted.

Respectfully submitted,

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[4] West Jersey suggests that the case is unusual because of its particular facts (Br. p. 11). While this might be relevant if the question were whether the decision of the court was correct assuming it had the power to make the decision at all, it is entirely irrelevant when what is at stake is the existence of the power. As we have indicated, the only facts material to that question, under West Jersey's reading of the statute, are that the Commission committed an error of law requiring a remand, which thereupon brought into play the court's section 402(h) power to decide for itself the scope of the remanded proceeding.